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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-229

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO DIONISIO, WITNESS
BEFORE THE SPECIAL FEBRUARY 1971 GRAND JURY

No. 71-850

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD J. MARA, WITNESS
BEFORE THE SPECIAL SEPTEMBER 1971 GRAND JURY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in No. 71-229 (Dionisio Pet. App. A 12-19) is reported at 442 F. 2d 276. The opinion of the district court in No. 71-229 (Dionisio Pet. App. C 22-24) is not reported.

The opinion of the court of appeals in No. 71–850 (Mara Pet. App. A 9–17) is reported at 454 F. 2d 580. The order of the district court in No. 71–850 (Mara Pet. App. B 18–19) was entered without an opinion and is not reported.

JURISDICTION

The judgment of the court of appeals in No. 71–229 was entered on March 25, 1971. On June 14, 1971, the court of appeals denied a petition for rehearing with suggestion for rehearing *en banc*. On July 8, 1971, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to August 13, 1971, and the petition was filed on that date; it was granted on May 30, 1972.

The judgment of the court of appeals in No. 71–850 was entered on December 1, 1971. The petition for a writ of certiorari was filed on December 30, 1971; it was granted on May 30, 1972.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourth Amendment bars a grand jury that is investigating illegal activity from compelling a witness, without first showing that the request is "reasonable," to furnish a voice exemplar for comparison with exhibits consisting of records of lawfully intercepted wire communications, or to provide handwriting and printing exemplars for comparison with other writings before the grand jury.

2. If so, whether the preliminary showing needed to satisfy Fourth Amendment standards must be made in an open, adversary hearing.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

No. 71-229—*Dionisio*

The Special February 1971 Grand Jury was convened in the Northern District of Illinois for the purpose of investigating illegal gambling operations in and around the City of Chicago. During its investigation, it received as exhibits voice recordings obtained under court orders, based on warrants issued under 18 U.S.C. 2518 authorizing the interception of wire communications.

The grand jury then subpoenaed approximately twenty persons, including respondent Dionisio, and sought to obtain from them voice exemplars for identification purposes. Each witness was informed that he was a potential defendant in a matter under investigation by the grand jury. The witnesses were instructed to examine a transcript of an authorized recording of an intercepted communication, and to go to a nearby room and read the transcript into a telephone that was connected to a recording device.[1]

[1] The witnesses were to give the exemplars outside the grand jury room, so that they could have their lawyers present. Each witness was to accompany an FBI agent, who had been appointed as an agent of the grand jury by its foreman, to a telephone located in one of the offices of the United States Attorney. No objections were made to the location of the telephone or recording device.

Dionisio and other witnesses[2] refused to follow those instructions, asserting that the compelled disclosure of a voice exemplar before a grand jury violated rights guaranteed under the Fourth and Fifth Amendments (D. App. 9–10).[3]

The government then filed in the United States District Court for the Northern District of Illinois separate petitions to compel Dionisio and other witnesses to furnish voice exemplars to the grand jury. The petitions stated (D. App. 4–5) that the exemplars were "essential and necessary" to the grand jury investigation, and that they would "be used solely as a standard of comparison in order to determine whether or not the witness is the person whose voice was intercepted * * *." Following a hearing, the district court rejected the various constitutional arguments of the witnesses and ordered that they provide the exemplars in compliance with the grand jury subpoenas (Dionisio Pet. App. C 22–24). When Dionisio persisted in his refusal to give a voice exemplar, the district court on February 22, 1972, adjudged him in civil contempt and committed him to prison until he obeyed the court order or until the term of the Spe-

[2] One of the witnesses who refused to give a voice exemplar was Charles Bishop Smith. He was originally listed with Dionisio as a respondent in this case; the petition was, however, dismissed as to him by the government in October 1971, after he had been indicted by the grand jury.

[3] "D. App." references are to the joint Appendix in No. 71–229, on file with the Clerk of this Court.

cial February 1971 Grand Jury expired (D. App. 14–16, 18).[4]

The court of appeals reversed (Dionisio Pet. App. A 12–19). It rejected the contentions that the grand jury's request for voice exemplars violated rights under the Fifth and Sixth Amendments (Dionisio Pet. App. A 14), but it concluded that to compel compliance with the request would violate Fourth Amendment rights. In the court's view the grand jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars" (Dionisio Pet. App. A 17). It therefore held that this "seizure" of physical evidence violated the "standard of reasonableness" required by the Fourth Amendment, under *Davis* v. *Mississippi*, 394 U.S. 721. Equating the procedure followed by the grand jury in this case to the police arrests involved in *Davis*, the court stated (Dionisio Pet. App. A 18–19): "The dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*."

[4] The life of the special grand jury involved here is 18 months, but it may be extended an additional 18 months under 18 U.S.C. 3333(a). On July 17, 1972, the life of the Special February 1971 Grand Jury was extended for an additional six months.

The Special September 1971 Grand Jury was convened in the Northern District of Illinois for the purpose of investigating thefts of interstate shipments that were taking place in that part of the state. During its investigation, it received as exhibits certain writings which were relevant to the offenses under consideration.

The grand jury then subpoenaed respondent Mara and sought to obtain from him handwriting and printing exemplars for comparison with these exhibits. Mara appeared before the grand jury on September 23 and 28, 1971. He was each time informed that he was a potential defendant in the matter being investigated, and was then directed to furnish the exemplars. On both occasions, he refused to do so.

The government then filed in the United States District Court for the Northern District of Illinois a petition to compel Mara to furnish handwriting and printing exemplars to the grand jury. The petition stated that the exemplars were "essential and necessary" to the grand jury's investigation (M. App. 3);[5] it was accompanied by an affidavit of an FBI agent, submitted *in camera,* which set forth the basis for seeking the exemplars from Mara. The district court ordered Mara to provide the exemplars (Mara Pet. App. B 18–19). When he continued to refuse to do so, he was adjudged to be in civil contempt and committed to prison until he obeyed the court order

[5] "M. App." references are to the Supreme Court Appendix in No. 71–850 on file with the Clerk of this Court.

or until the term of Special September 1971 Grand Jury expired (Mara Pet. App. C 20–21).[6]

The court of appeals reversed (Mara Pet. App. A 9–17). Relying on its earlier opinion in *Dionisio, supra*, it held (*id.* at 10–11) that "compelling * * * [a grand jury witness] to furnish exemplars of his handwriting and printing is forbidden by the Fourth Amendment unless the Government has complied with its [the Fourth Amendment's] reasonableness requirement * * *."

The court then turned to "the procedure the Government must follow in attempting to demonstrate that the proposed seizure of the exemplars is reasonable" and "the content of the reasonableness showing necessary" (*id.* at 11). It rejected the *in camera* procedure used in the district court, and ruled that "the Government must show reasonableness by presenting its affidavit [or other proof] in open court, in order that * * * [the witness] may contest its sufficiency" (*ibid.*). With regard to "[t]he substantive showing that the Government must make," the court held (*id.* at 15–16) that proof was required "that the grand jury investigation was properly authorized * * * that the information sought is relevant to the inquiry, and that * * * the grand jury process is not being abused." In addition, it stated (*id.* at 16) that in these circumstances the government must demonstrate "why satisfactory * * * exemplars cannot be obtained from other sources without grand

[6] The court of appeals released Mara on bail pending his appeal to that court (Mara Pet. App. D 22–23).

jury compulsion"; it is, the court concluded (*ibid.*), "an abuse of the grand jury process for the Government to impose on that body to perform investigative work that can be, and heretofore has been, successfully accomplished by the regular investigative agencies of Government."

The affidavit of the FBI agent that was before the district court was considered by the court of appeals to lack sufficient detail to establish the necessary connection between the identification evidence sought and the purpose to be served (*ibid.*).

SUMMARY OF ARGUMENT

It is well settled that the taking of voice and handwriting exemplars from an individual does not require him to produce evidence of a testimonial nature and therefore does not violate the Fifth Amendment privilege against self-incrimination. Our position in these cases is that the obtaining of similar evidence through the grand jury subpoena process also does not amount to the type of governmental intrusion on individual privacy against which the Fourth Amendment affords protection.

A person's voice and handwriting, much the same as his facial features, are merely identifying physical characteristics which are constantly exposed to public observation. They are not personal characteristics that an individual "seeks to preserve as private" (*Katz* v. *United States*, 389 U.S. 347, 351), or with respect to which he can claim a reasonable "expectation of privacy" (*Terry* v. *Ohio*, 392 U.S. 1, 9). Hence, requir-

ing a grand jury witness to submit to a voice test or to furnish a handwriting specimen does not constitute an unreasonable search or seizure in violation of the Fourth Amendment. There is no intrusion into the body; the witness' private life is not in any way invaded; nor is there involved any disclosure of personal thoughts, opinions or privately-held information.

Moreover, the fact that here the voice and handwriting exemplars were sought through the grand jury process gives rise to no Fourth Amendment claim. It has long been recognized that the calling of a person before a grand jury does not constitute a seizure of the person, as does, for example, a police detention. Every citizen has a duty to appear and give evidence when properly summoned. The fact that the performance of this duty might cause some inconvenience or result in a marginal interference with an individual's private life plainly does not excuse him from complying with a grand jury subpoena on Fourth Amendment grounds.

This is not to say that the constitution affords no protection against a clear abuse of the grand jury process, such as where a subpoena is issued that is too sweeping in scope and undiscriminating in character. But that is not the situation in these cases. Here all that was requested was specific exemplar evidence for comparison with designated material already in the grand jury's possession; it was sought solely for identification purposes. Such a request does not run afoul of the Fourth Amendment.

The court below therefore erred in holding that, before grand jury witnesses can be required to furnish specimens of their voice and handwriting, the government must make a preliminary showing of "reasonableness" in an open, adversary proceeding. This Court has repeatedly declined to permit such litigious interruptions of the grand jury process. To impose such a requirement here on the basis of so tenuous a claim of privacy as these respondents have raised would provide virtually every grand jury witness with an opportunity to impede the investigative process any time he is subpoenaed to testify or to bring in books and records, for his very appearance necessarily involves some interference with his private life. The Fourth Amendment does not demand or authorize judicial scrutiny of this sort.

Even assuming *arguendo,* however, that some preliminary showing of "reasonableness" must be made before grand jury subpoenas seeking exemplar evidence can be enforced, the court of appeals erred in requiring that the government must meet its burden in an open, adversary proceeding. It is our submission that the government should be permitted to show that such a grand jury request satisfies Fourth Amendment standards in an *ex parte, in camera* proceeding before an independent magistrate, as is the customary procedure in analogous Fourth Amendment situations where a search warrant or an arrest warrant is sought.

ARGUMENT

I

INTRODUCTION

The central question before the Court in these two cases relates solely to the Fourth Amendment right of witnesses before a grand jury to withhold from that investigative body exemplar evidence sought purely for identification purposes. While an additional objection to providing the grand jury with exemplars was made in both cases under the Fifth Amendment, that contention was rejected by the court of appeals.[7] Since the Fifth Amendment ruling of the court below bears directly on the formulation of the Fourth Amendment issue to be decided here, we refer at the outset to that aspect of these cases.

This Court's holding in *Gilbert* v. *California,* 388 U.S. 263, makes it clear that the taking under compulsion of exemplar evidence of the sort involved here does not violate the privilege against self-incrimination. *Gilbert* involved handwriting exemplars taken by an FBI agent from an accused in custody and admitted into evidence at trial. The Court there stated (388 U.S. at 266–267): "One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication

[7] See Dionisio Pet. App. A 14, and Mara Pet. App. A 10, n. 1. Similarly, the court below rejected respondents' arguments premised on a right to counsel under the Sixth Amendment.

within the cover of the [Fifth Amendment] privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection."

The same point was made in *United States* v. *Wade*, 388 U.S. 218, where the Court ruled that it was proper to compel a defendant in a lineup, who was in custody under an indictment for bank robbery, to speak the words allegedly uttered by the robber during the holdup.[8] Rejecting the contention that such a lineup procedure violated the privilege against self-incrimination, the Court stated in *Wade, supra*, 388 U.S. at 222–223: "It is compulsion of the accused to exhibit characteristics, not compulsion to disclose any knowledge he might have. * * * [C]ompelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt."

The *Gilbert* and *Wade* decisions thus lay to rest any claim that the obtaining of exemplars, whether they be handwriting or voice, by compulsory process in some way implicates the Fifth Amendment. And see *Schmerber* v. *California*, 384 U.S. 757, 764; cf.

[8] The Court held that because the lineup was conducted without notice to, and outside the presence of, the accused's attorney, the accused was deprived of his Sixth Amendment right to counsel.

Kirby v. *Illinois*, No. 70–5061, decided June 7, 1972.[9] Given this, the court of appeals' equation of the handwriting and voice exemplars involved here with private books and papers (Dionisio Pet. App. A 16) for the purpose of resolving the present Fourth Amendment issue misconceives the essential nature of the question now before the Court. For, whatever "light" the Self-Incrimination Clause might in other contexts throw "on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment" (*Boyd* v. *United States*, 116 U.S. 616, 633),[10] in the present context Fifth Amendment considerations do not come into play. See *United States* v. *Doe*, 457 F. 2d 895, 897 (C.A. 2), pending on petition for certiorari, No. 71–6522. At issue here is whether a grand jury subpoena to produce exemplars of the variety considered in *Gilbert* and *Wade* is the kind of governmental intrusion on privacy against which the Fourth Amendment alone affords protection, there being no violation of the Self-Incrimination Clause. For the reasons set forth below, we think not.

[9] The courts of appeals agree. See, *e.g.*, *United States* v. *Doe* (*Devlin*), 405 F. 2d 436, 438–439 (C.A. 2); *United States* v. *Webster*, 422 F. 2d 290 (C.A. 4); *Newsom* v. *United States*, 402 F. 2d 835, 836 (C.A. 5); *Fraser* v. *United States*, 452 F. 2d 616, 619 n. 5 (C.A. 7); *Abernathy* v. *United States*, 402 F. 2d 582, 584–585 (C.A. 8); *Gregory* v. *United States*, 391 F. 2d 281 (C.A. 9), certiorari denied, 393 U.S. 870; *Green* v. *United States*, 386 F. 2d 953, 956–957 (C.A. 10).

[10] We note in passing that it has been observed that "[t]he Supreme Court has to a large extent recanted that part of the *Boyd* dicta which would apply the Fourth Amendment to an order to produce a document, properly a Fifth Amendment concern." 8 Wigmore, *Evidence* § 2264, at 381–384, n. 4 (McNaughton rev. 1961).

II

THE GRAND JURY'S USE OF ITS SUBPOENA POWER TO COMPEL WITNESSES TO APPEAR AND FURNISH VOICE AND HANDWRITING EXEMPLARS FOR PURPOSES OF IDENTIFICATION DOES NOT VIOLATE THE FOURTH AMENDMENT

A. THE FOURTH AMENDMENT PROTECTION

The Fourth Amendment guarantees that all people shall "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *." Its essential purpose is to protect individual privacy. As stated in *Terry* v. *Ohio, supra,* 392 U.S. at 9, "wherever an individual may harbor a reasonable 'expectation of privacy', * * * he is entitled to be free from unreasonable governmental intrusion." The nature of the protected right was explained in *Katz* v. *United States, supra,* 389 U.S. at 351, as follows:

> * * * the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. * * *

It is our position that voice and handwriting exemplars may be taken from individuals by compulsory process without invading any reasonable expectation of privacy. The tone and manner of one's speech and the way in which a person signs his name are identifying physical characteristics that are "constantly exposed to public observation" (*People* v.

Ellis, 65 Cal. 2d 529, 535 (Cal. Sup. Ct.; Traynor, C.J.)). By their very nature, they are no more private to the individual than his facial features or identifying marks on his body, such as scars or birthmarks, that normally remain in plain view. As the Second Circuit recently stated in *United States* v. *Doe*, *supra*, 457 F. 2d at 898: "Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection, *Katz* v. *United States*, *supra*, the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear." [11]

Precisely because these identifying characteristics are on constant public display, compelling an individual by grand jury subpoena to furnish voice or handwriting specimens involves, we submit, no invasion of the privacy of his "person." [12] Unlike the blood sample involved in *Schmerber* v. *California*, *supra*,

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[11] This Court's recent decision in *United States* v. *United States District Court for the Eastern District of Michigan*, No. 70–153, decided June 19, 1972, was of course concerned with Fourth Amendment considerations relating to the content of speech; the Fourth Amendment issue in these cases relating to voice and handwriting exemplars sought solely for identification purposes was not involved there.

[12] We agree with the Second Circuit that "[e]xemplars, whether handwriting or voice, if covered at all [by the Fourth Amendment], must be considered elements of 'persons' rather than 'houses, papers and effects.'" *United States* v. *Doe*, *supra*, 457 F. 2d at 897.

for example, the exemplars sought here contemplate no "intrusions into the body" (384 U.S. at 768). Moreover, as this Court observed in a somewhat related context involving fingerprinting, there is "none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis* v. *Mississippi,* 394 U.S. 721, 727. Nor are these respondents being subjected to the "severe, though brief, intrusion upon cherished personal security" and the "annoying, frightening, and perhaps humiliating experience" involved in even a limited police search (*Terry* v. *Ohio, supra,* 392 U.S. at 24–25).

The voice test to which the grand jury has required Dionisio to submit for comparison with recordings of lawful court-ordered wiretaps, and the handwriting exemplars sought from Mara for comparison with other writings properly before the grand jury, are no more repugnant to the Fourth Amendment than is the "requiring [of] a grand jury witness to remove a mask, in order to permit comparison with surveillance photographs * * *" (*United States* v. *Doe, supra,* 457 F. 2d at 898). In none of these situations does the compelled disclosure of identifying physical characteristics invade a "reasonable expectation of privacy" in the *Terry* or *Katz* sense. Indeed, this is the clear implication of this Court's decisions in *Gilbert* and *Wade* (see pp. 11–13, *supra*). The fact that the defendants in those cases were lawfully in custody does not change the nature of the right involved. To the contrary, if nontestimonial exemplars can be compelled from a person charged with a

crime, there is no reason why the same identifying evidence cannot be demanded from one not yet charged in any sense, but only suspected of being involved in the matters under grand jury investigation—a suspicion, we add, which could well be dissipated by the exemplars sought.[13] "There is no basis," as the Second Circuit observed in *United States* v. *Doe, supra,* 457 F. 2d at 898–899, "for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers."

B. THE GRAND JURY SUBPOENA PROCESS

The fact that one's voice and handwriting are not themselves within the area of protected privacy that is sheltered from unreasonable government intrusions does not end the inquiry. For if the effort to obtain exemplars of those identifying physical characteristics is conducted in a manner that otherwise improperly invades "a reasonable expectation of privacy," whether it be an impermissible interference with person (see *Davis* v. *Mississippi, supra*) or

[13] As the Second Circuit noted in *United States* v. *Doe, supra,* 457 F. 2d at 901, "there may well be instances where the Government's purpose in seeking handwriting exemplars is not to show that the witness has committed a crime but rather to show that he has not, *e.g.*, when the true suspect says that incriminating writings were the work of the witness rather than himself." In such instances, the court of appeals pointed out (*id.* at 901, n. 3), "[w]hile normally such a witness would happily comply, cases are not unknown where an innocent third party has accepted 'suggestions' that he 'take the rap.'"

property (see *Hale* v. *Henkel,* 201 U.S. 43), then compelling the production of such "tainted" evidence still might run afoul of the Fourth Amendment. But such, we submit, is not the situation here.

In both of these cases, the exemplars were sought from the respondents by a grand jury subpoena that requested only the identification evidence now under consideration. The court below, placing heavy reliance on *Davis* v. *Mississippi, supra,* equated the compulsory process used here with the detention procedure that this Court found in *Davis* to violate the Fourth Amendment and thus to invalidate the use at trial of Davis' fingerprints taken while he was unlawfully detained (see Dionisio Pet. App. A 18–19).[14] But this analysis misconceives the traditional nature and function of grand juries in this country. As pointed out in *United States* v. *Doe, supra,* 457 F. 2d at 898:

> The distinction between the compulsion exerted by a subpoena and detention by law enforcement officers is far from being a mere matter of words. The latter is abrupt, is effected with force or the threat of it and often in de-

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[14] The fingerprints involved in *Davis* were obtained during an extended involuntary detention of 24 youths taken into custody in a ten-day period in connection with a police investigation of a rape. In holding such police procedures to violate the Fourth Amendment, the Court stated (394 U.S. at 728): "We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." And see *United States* v. *Greene,* 429 F. 2d 193, 197, n. 7 (C.A. D.C.).

> meaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court.

The calling of a person before a grand jury, moreover, does not constitute a seizure of the person, as does police detention. Compare *Davis* v. *Mississippi, supra,* 394 U.S. at 726–727; *Terry* v. *Ohio, supra.* It long has been recognized that appearing and giving evidence before a grand jury "are public duties which every person * * * is bound to perform upon being properly summoned." *Blair* v. *United States,* 250 U.S. 273, 281; *United States* v. *Bryan,* 339 U.S. 323, 331; and see *Kastigar* v. *United States,* No. 70–117, decided May 22, 1972. The right of each citizen to "a reasonable expectation of privacy" does not excuse him from these obligations, notwithstanding that it may "interfere with [his] ability to do exactly what he does or does not please." *United States* v. *Doe, supra,* 457 F. 2d at 897. And this is so even if he is himself suspected of committing the offenses under investigation. See *e.g., Cobbledick* v. *United States,* 309 U.S. 323, 325; *United States* v. *Winter,* 348 F. 2d 204, 207–208 (C.A. 2), certiorari denied, 382 U.S. 955.

As this Court recently stated in *Branzburg* v. *Hayes,* No. 70–85, decided June 29, 1972, slip op. 16: "Citizens generally are not constitutionally immune from grand jury subpoenas." Just as *Branzburg* con-

firmed that there is no privilege in the First Amendment relieving newsmen from the long standing duties to attend and testify, so too we believe that the Fourth Amendment provides no such haven for these respondents. As the court below correctly pointed out in *Fraser* v. *United States*, 452 F. 2d 616, 620: "A grand jury subpoena to testify is not that kind of governmental intrusion on privacy against which the Fourth Amendment affords protection, once the Fifth Amendment is satisfied." [15]

To be sure, this Court observed in *Hale* v. *Henkel*, 201 U.S. 43, 76, that a grand jury subpoena *duces tecum*—requiring the production of documentary evidence of a testimonial nature—which by its terms sweeps too broadly "may constitute an unreasonable search and seizure within the Fourth Amendment." There, however, the Fourth Amendment violation derived essentially from the Court's reluctance to compel a wholesale disclosure of private thoughts and opinions, which is condemned by the Fifth Amendment. And it was even suggested in that case (201 U.S. at 73) that the result might well have been different if, as here, the subpoena had posed no threat to the privilege against self-incrimination. And see *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 196, 202–208; *United States* v. *Doe*, *supra*, 457 F. 2d at 900.

In any event, the grand jury subpoenas involved in these cases do not suffer from overbreadth, whatever

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[15] As we pointed out earlier (*supra*, pp. 11–13), Fifth Amendment considerations are not involved in these cases.

might be the constitutional infirmity resulting therefrom. As we earlier stated, each called only for production of specific exemplar evidence for comparison with lawfully obtained recordings (*Dionisio*) and writings (*Mara*) already in the grand jury's possession. The court below labelled such requests, "general fishing expeditions into the private affairs of witnesses" (Dionisio Pet. App. A 16). But that characterization is accurate only in the sense that every grand jury proceeding is a "general fishing expedition," as a result of that body's broad mission to ferret out the facts without knowing in advance what is involved or where its investigation will lead. This Court recently so stated in *Branzburg* v. *Hayes*, *supra*, slip op. 21–22:

> Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, [the grand jury's] investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U.S. 273, 282. Hence the grand jury's authority to subpoena witnesses is not only historic * * * but essential to its task.

The issuance of these narrowly-drawn subpoenas was a proper exercise of this broad investigative authority. It is the essence of the grand jury proceeding

to question and obtain evidence from a witness in circumstances that would not permit detaining him under the traditional probable cause standard. In this respect, of course, the grand jury's powers exceed those of most investigatory bodies, including the police; but this is necessarily so in view of the fact that the ultimate purpose of the grand jury is to determine if probable cause exists. See *Hale* v. *Henkel, supra,* 201 U.S. at 65; *Hendricks* v. *United States,* 223 U.S. 178, 184. Hence, the absence of probable cause is to be expected, and does not make unreasonable the action ordering the exemplars here.

We disagree with the court below (Dionisio Pet. App. A 19) that the fact that the *Dionisio* grand jury subpoenaed approximately twenty persons to furnish voice exemplars is cause for complaint. Given the nature of the illicit gambling business, it is not unlikely that many people were involved in the matter under investigation. Whether the grand jury was seeking to identify a number of voices, or had called twenty people in an effort to identify one voice, is not shown in the record. Whichever is the case, however, the number of people involved is not, by itself, determinative here.

Insofar as a right of privacy can be founded on the Fourth Amendment, it is a personal right, and turns on the oppressiveness of the action complained of to the individual. *Alderman* v. *United States,* 394 U.S. 165, 174; *Wong Sun* v. *United States,* 371 U.S. 471. If Dionisio or Mara had been repeatedly ordered to appear before a grand jury and give voice or handwrit-

ing exemplars, that might involve undue oppression that would warrant constitutional protection. See *Branzburg* v. *Hayes, supra,* slip op. 1–3 (Powell, J., concurring). But nothing of the sort happened in these cases; each respondent was asked only to give a single exemplar at a reasonable time and place. The Fourth Amendment plainly does not relieve them of their duty to do so (see pp. 19–20, *supra*) simply because the grand jury also subpoenaed similar evidence from other individuals.

III

THE COURT BELOW ERRED IN HOLDING THAT THE FOURTH AMENDMENT REQUIRES IN THE PRESENT CIRCUMSTANCES THAT THE GOVERNMENT MAKE A PRELIMINARY SHOWING OF "REASONABLENESS" IN AN OPEN, ADVERSARY PROCEEDING

A. NO PRELIMINARY SHOWING OF REASONABLENESS SHOULD BE REQUIRED

The holding of the court below in each of these cases requires that the government, as a condition to the grand jury's receipt of the voice and handwriting exemplars, first establish in an open, adversary proceeding the "reasonableness" of the subpoenas issued to these witnesses. The imposition of any such requirement is, we submit, an unwarranted departure from existing law.

As we earlier indicated, it has long been the function of the grand jury, both in this country and in England, to conduct a "grand inquest, * * * the scope of whose inquiries is not to be limited narrowly by ques-

tions of propriety or forecasts of the probable result of the investigation." *Blair* v. *United States, supra,* 250 U.S. at 282. Its task "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States* v. *Stone,* 429 F. 2d 138, 140 (C.A. 2). As this Court stated in *Wood* v. *Georgia,* 370 U.S. 375, 392, "society's interest is best served by a thorough and extensive investigation." See also *Hannah* v. *Larche,* 363 U.S. 420, 499 (Douglas, J., dissenting). And this includes the following up of "tips, rumors, evidence proferred by the prosecutor, or the personal knowledge of the grand jurors." *Branzburg* v. *Hayes, supra,* slip op. 36.

This Court has repeatedly declined to stop the grand jury's "examination of witnesses * * * until a basis is laid by an indictment formally preferred * * *" (*Hale* v. *Henkel, supra,* 201 U.S. at 65). It stated in *Blair* v. *United States, supra,* 250 U.S. at 282, that the witness "is not entitled to set limits to the investigation that the grand jury may conduct." Scrutiny of the basis, scope or nature of a particular inquisition has been judiciously avoided. See *Costello* v. *United States,* 350 U.S. 359; *Holt* v. *United States,* 218 U.S. 245. Indeed, last Term in *Branzburg* v. *Hayes, supra,* this Court rejected an effort by the media to interject into the grand jury process on First Amendment grounds a type of preliminary hearing similar to the one required by the court of appeals here.[16]

[16] In *Branzburg*, the preliminary government showing that was proposed was (1) "that there is probable cause to believe

There is, we submit, no more reason in these cases to require that the government litigate the question of "reasonableness" before a subpoena seeking voice and handwriting exemplars can be enforced.[17] Such litigious interruptions of the grand jury process have long been discouraged by this Court. Compare *Cobbledick* v. *United States*, 309 U.S. 323, 325; *DiBella* v. *United States*, 369 U.S. 121; *United States* v. *Ryan*, 402 U.S. 530. Indeed, if inroads on this "acquired * * * independence" (*Costello* v. *United States*, *supra*, 350 U.S. at 362) of grand juries are now to be permitted on the basis of so tenuous a claim of invasion of privacy as is involved here, virtually every grand jury witness will be able to impede the investigative process any time he is subpoenaed to testify or to bring in books and records, for his very

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that the newsman has information which is clearly relevant to a specific probable violation of law"; (2) "that the information sought cannot be obtained by alternative means less destructive of First Amendment rights"; (3) that there is "a compelling and overriding interest in the information." *Branzburg* v. *Hayes*, *supra*, slip op. 19 (Stewart, J., dissenting).

In *Mara*, the court below required that the government make a preliminary showing (1) "that the information sought is relevant to the inquiry"; (2) that "satisfactory * * * exemplars cannot be obtained from other sources without grand jury compulsion," and why; (3) "that the grand jury's request for exemplars is 'adequate, but not excessive, for the purposes of the relevant inquiry,'" that is, "that the grand jury process is not being abused." See Mara Pet. App. A 15–16.

[17] The proposed new Rule 41.1, Fed.R.Crim.P., does not contemplate that the government must make a preliminary showing before a grand jury witness can be required to furnish exemplar evidence. See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 52 F.R.D. 409, 462 (1971). The proposed rule "provides a procedure by

appearance necessarily involves some marginal interference with his private life. We do not believe that the Fourth Amendment demands or authorizes judicial scrutiny of this sort. As the Second Circuit stated in *United States* v. *Doe, supra,* 457 F. 2d at 899–900:

> In order for the grand jury to function, it must have the cooperation of citizens in producing evidence, and of doing that quickly, subject, of course, to the limits imposed by the Fifth Amendment privilege. The safeguards built into the grand jury system, such as enforced secrecy and use of court process rather than the constable's intruding hand as a means of gathering evidence, severely limit the intrusions into personal security which are likely to occur outside the grand jury process. * * * Apart from [an investigation so sweeping in scope and undiscriminating in character as to offend other basic constitutional precepts], when the grand jury has engaged in neither a seizure nor a search, there is no justification for a court's imposing even so apparently modest a requirement as a showing of "reasonableness"—with the delay in the functioning of the grand jury which that would inevitably entail.

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which a federal magistrate may issue an order authorizing a nontestimonial identification procedure" by law enforcement officers (52 F.R.D. at 467). But, as the Advisory Committee Note following the rule indicates, citing *United States* v. *Doe (Berlin), supra:* "Compelling a suspect to submit to a nontestimonial identification procedure has been sustained when it is accomplished by means of a grand jury subpoena." 52 F.R.D. at 469.

B. AT ALL EVENTS, THE PRELIMINARY HEARING SHOULD NOT BE AN OPEN, ADVERSARY ONE

Even assuming *arguendo* that a grand jury request for exemplar evidence must be accompanied by some showing of "reasonableness" before it can be enforced, however, the court of appeals erred by holding in *Mara* that the preliminary showing must be made in an open, adversary proceeding.[18] We submit that the government, if required to meet any burden at all, should be permitted to show that a grand jury request satisfies Fourth Amendment standards in an *ex parte, in camera* proceeding before an independent magistrate.

This procedure will, of course, safeguard the privacy rights of grand jury witnesses in the present context, such as they are, as effectively as it protects similar rights of other citizens in analogous Fourth Amendment situations where a search warrant or an arrest warrant is involved. At the same time, however, it will not, in contrast to the full-blown adversary hearing required by the court below, cause the type of "undue interruption [to] the inquiry instituted by grand jury" (*Cobbledick* v. *United States*, *supra*, 309 U.S. at 327) that this Court, as we earlier indi-

[18] In *Dionisio*, the court below did not have to consider the type of proceeding in which the government would show "reasonableness," since there was no effort in that case to make a preliminary showing. If therefore this Court should determine that some kind of showing is necessary, it would be appropriate to remand *Dionisio* to the district court to permit the government to satisfy whatever standard this Court might announce.

cated, has been so careful to guard against. Nor will it compromise the "long-established policy" of grand jury secrecy (*United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 681) that has long been recognized as an "indispensable" (*United States* v. *Johnson*, 319 U.S. 503, 513) prerequisite to that body's investigative process. See also *United States* v. *Proctor & Gamble Co., supra*, 356 U.S. at 682. Given the very limited—indeed, in our view, negligible—invasion of privacy involved in taking voice and handwriting exemplars, on the one hand, and the inevitable lengthy delays in, and breaches of the secrecy of, grand jury investigations that would result from requiring that the preliminary showing of "reasonableness" be open and adversary, on the other, we submit that, if a "hearing" requirement is now to be interjected into the grand jury process, the *ex parte*, closed proceeding that we propose is an appropriate accommodation of these conflicting interests.

This accommodation is not inconsistent with *Alderman* v. *United States*, 394 U.S. 165, on which the court below placed heavy reliance. In *Alderman*, the issue concerned the exclusion of evidence already obtained that was the product of an admittedly unlawful search. Here, by contrast, the basic question is whether the grand jury's initial request for certain evidence is

"reasonable" when measured by Fourth Amendment standards. That threshold determination, we submit, may in the present context, just as it is in other contexts, be properly decided by an independent magistrate in *ex parte, in camera* proceedings.[19]

CONCLUSION

For the reasons stated, the judgment of the court of appeals in these cases should be reversed and the district court's orders adjudging respondents in civil contempt should be reinstated. In the event that this Court should determine, however, that some preliminary showing of "reasonableness" is required before these grand jury witnesses must furnish voice and handwriting exemplars, the cases should be remanded

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[19] The preliminary showing of reasonableness made by the government in *Mara*, while in our view not necessary, was, we believe, adequate to meet Fourth Amendment standards. The affidavit submitted *in camera* to the district court—which is on file with the Clerk of this Court—states the nature of the unlawful activities under investigation by the grand jury, the origin and character of the writings already introduced as grand jury exhibits, and the suspected relationship of respondent to those writings that led to subpoenaing from him the handwriting exemplars. This, we believe, would suffice to meet whatever burden, if any, might be imposed on the government to make a preliminary showing.

to the district court for further proceedings in accordance with this Court's opinion.

Respectfuly submitted.

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